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NOTES & COMMENT

THE CONSTITUTIONAL GUARANTY AGAINST SELF INCRIMINATION: UNITED STATES *v.* SULLIVAN.—United States *v.* Sullivan,¹ a recent decision of the United States Supreme Court, limiting the scope of the Constitutional guaranty against self incrimination raises anew the question as to the feasibility of the extension or restriction of the rule. While the wording of the Constitutional provision by its terms refers only to compelling a defendant to testify against himself in a criminal case,² the decisions have extended the immunity so as to protect a person from being forced to give information which might lead to his being prosecuted criminally.

Such a question arose in United States *v.* Lombardo,³ involving Sec. 6 of the act dealing with the harboring of alien prostitutes,⁴ which required of every person keeping any alien woman or girl in a house of prostitution, or for any immoral purpose, to file with the Commissioner General of Immigration a statement in writing setting forth certain facts and for a failure so to file such person should be guilty of a misdemeanor. The defendant contended that according to this section, she was required to incriminate herself under the criminal laws of Washington.⁵ Sustaining this contention, the court held it is beyond the power of the Congress to penalize one for failing to render a statement which is self incriminatory, in that it

¹ 71 L. Ed. 726 (1927).

² U. S. Const., Fifth Amendment: "No person shall be * * * compelled in any criminal case to be a witness against himself.

³ United States *v.* Lombardo, 228 Fed. 980 (W. D. Wash. 1915).

⁴ White Slave Traffic Act, June 25, 1910, Chap. 395, Sec. 6.

⁵ Secs. 2688 and 2440. Rem. & Bal. Codes of Washington.

Sec. 2440. Every person who shall place a female in the charge or custody of another person for immoral purposes, or in a house of prostitution with intent that she shall live a life of prostitution, or who shall compel any female to reside with him, or with any other person for immoral purposes, or for the purposes of prostitution or shall compel any such female to reside in a house of prostitution, or to live a life of prostitution * * * shall be punished by imprisonment in the state penitentiary for not more than five years, or by a fine of not more than two thousand dollars.

Sec. 2688. Every * * * person practicing or soliciting prostitution, or keeping a house of prostitution, or * * * person who lives or works in a house of prostitution or solicits for any prostitute or house of prostitution * * * is a vagrant and shall be punished by imprisonment in the county jail for not more than six months or by a fine of not more than five hundred dollars.

is violative of the express provisions of the Fifth Amendment. Furthermore it is the manifest purpose of the constitutional privilege to place the stamp of silence upon parties and witnesses, so that the maxim of "*nemo tenetur seipsum accusare*" may be kept inviolate.

In *Boyd v. United States*,⁶ in an attempt to accuse the defendant of fraud upon the customs revenue laws, which charge, if proved, would ultimate in a forfeiture of his goods,⁷ the government moved to require the defendant to produce his private books, papers and invoices.⁸ The Supreme Court, in this regard, ruled that a statute which compels the compulsory production of a party's private books and papers to be used against him in a criminal proceeding or forfeiture, was offensive to the spirit of the Fourth Amendment,⁹ because it does not require an actual entry upon premises and a search for and seizure of papers, to constitute an unreasonable search and seizure. The instant case was, moreover, within the prohibition of the Fifth Amendment for by submitting such evidence, the defendant in effect accused himself. Consequently, the statute was declared to be unconstitutional, and the mandate of the lower court directing the defendant to so produce was reversed.

In *United States v. Sullivan*, the defendant was convicted under an indictment which charged violation of Sec. 253 of the Revenue Act¹⁰ which makes a misdemeanor the failure to file an income tax return. It appeared that in the year 1921, defendant had had a net income in the amount of \$10,000, part of which was derived from the unlawful sale of intoxicating beverages and that he had refused to file any return. On appeal to the Circuit Court of Appeals for the Fourth Circuit,¹¹ it was held that the judgment of the court below must be reversed on the ground that Sec. 223,¹² so far as it requires a return from one whose income is derived from a violation of the criminal law is in conflict with the Fifth Amendment.

Certiorari to review the decision was granted and the Court of

⁶ *Boyd v. United States*, 116 U. S. 616 (1886).

⁷ Act to Amend the Customs Revenue Laws and to Repeal Moieties June 22, 1874, 18 Stat. 186, § 12.

⁸ *Ibid.* § 5.

⁹ Fourth Amendment to the Constitution: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¹⁰ Revenue Act of 1921, Session I, Chap. 136.

¹¹ 15 Fed. (2nd) 809 (C. C. A. 4th, 1926).

¹² *Supra*, note 10.

Appeals was reversed¹³ upon the ground that the protection of the Fifth Amendment was pressed too far. Mr. Justice Holmes delivering the opinion of the Court said that it might well be that the form of the income tax return called for answers the defendant was privileged from making but as to such questions he might have raised a specific objection. To refuse, however, to make any return at all was not the defendant's prerogative.¹⁴ In this connection, the court expressed the belief that the defendant could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law.

This decision was essential if any effect was to be given the previous decisions holding profits resulting from illegal liquor traffic are taxable.¹⁵ But there does not seem to be much relief in the suggestion that the defendant need not give all the details of his business, since almost any indication of "bootlegging" would be sufficient to cause revenue officers to investigate defendant's movements.

On the one hand it may be that it is more desirable to protect the criminal from making involuntary disclosures than to enforce the

¹³ Among the arguments advanced in holding for the defendants was that if in the case of *Boyd v. U. S.*, *supra*, defendant Boyd could not be compelled to produce his private books, papers and invoices for use in evidence against him, *a fortiori*, defendant in the instant case could not be required to submit written statements under oath, in answer to questions on a tax return, especially when these statements disclose the commission of a crime. To make such demands of the defendant, the court reasoned, would make him a witness against himself.

The Circuit Court, moreover, in its ruling relied to a great extent on the cases of *Counselman v. Hitchcock*, 142 U. S. 547 (1892) and *Arndstein v. McCarthy*, 254 U. S. 71 (1920). In the former, it was held that no statute which leaves a party or witness subject to prosecution after he answers the criminating question put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States.

Similarly, in the latter case, the immunity clause of § 7 of the Bankruptcy Act (Comp. St. § 9591), to the effect that no testimony given by a bankrupt at a meeting of creditors shall be offered in evidence against him in any criminal proceeding, was held not to afford a protection equivalent to that guaranteed by the Fifth Amendment, since it does not prevent the use of his testimony to search out other testimony to be used in evidence against himself or his property (citing *Counselman v. Hitchcock*, *supra*).

Holding the Revenue Act of 1921 failed to furnish adequate protection against self-incrimination, the Circuit Court, in view of the foregoing authorities, concluded that the defendant was entitled to invoke the privilege of the Fifth Amendment.

¹⁴ *Supra*, note 1.

¹⁵ See *United States v. Sischo*, 262 U. S. 165 (1923).

tax laws as applied to an illegal occupation. It has been cogently contended, moreover, that the fear of conviction for failure to file an income tax return would not impel a criminal to disclose the sources of his illegal earnings,¹⁶ no more than the fear of conviction for "boot-legging" influences a criminal from forsaking such an employment.

On the other hand, it may be maintained in consonance with the opinion of Mr. Justice Holmes, that there is no sound reason why an individual should refrain from making an income tax report simply because he was satisfied in the conviction that in so doing he might incriminate himself. In other words, an individual is not to assume functions of the court in determining whether or not the matter would accuse him.¹⁷ The possibility readily suggests itself, too, that to hold otherwise would tend to foster crime in offering an attractive refuge to lawbreakers.¹⁸

The border line cases in the application of the provisions of the Fifth Amendment will probably be decided according as the judges approve or disapprove of the policy embodied in the guaranty as applied to tax returns.

V. J. M.

QUASI-PARTNERSHIP LIABILITY: *MARTIN v. PEYTON*—"Much ancient learning as to partnership is obsolete."¹ With these words, the New York Court of Appeals begins its most recent decision upon the question of when persons, not ostensibly partners, may be subjected to liability for partnership obligations.

A hundred and fifty years ago, the English Court of Common Pleas, in the case of *Grace v. Smith*,² said, "Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes part of that fund on which the creditor of the trader relies for his payment."³ Under the rule of this case, as promulgated by the English courts, the right to share profits was decisive of partnership liability. The

¹⁶ *United States v. Yuginovich*, 256 U. S. 450 (1921).

¹⁷ 27 *Columbia Law Rev.* 467 (1927); Application of rule against Self Incrimination to Income Tax Returns.

¹⁸ *Mason, et al., v. United States*, 244 U. S. 362 (1917).

¹ *Martin v. Peyton, et al.*, 246 N. Y. 213, 217, 158 N. E. 77 (1927).

² 2 W. Bl. 998 (C. P. 1775).

³ *Ibid.* 1000.